

1 Trent W. Orr, State Bar No. 77656
Michelle Ghafar, State Bar No. 315842
2 EARTHJUSTICE
50 California Street, Suite 500
3 San Francisco, CA 94111
torr@earthjustice.org
4 mghafar@earthjustice.org
Tel: (415) 217-2000
5 Fax: (415) 217-2040

6 *Attorneys for Protestant Restore the Delta*

7
8 **BEFORE THE**
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10
11 HEARING IN THE MATTER OF
12 CALIFORNIA DEPARTMENT OF WATER
13 RESOURCES AND UNITED STATES
14 BUREAU OF RECLAMATION REQUEST
FOR A CHANGE IN POINT OF DIVERSION
FOR CALIFORNIA WATERFIX

RESTORE THE DELTA'S
PART 2 OPENING STATEMENT

1 1. Good day. I am Barbara Barrigan-Parrilla, Executive Director of Restore the Delta.
2 We are a grassroots organization of over 40,000 supporters, dedicated to saving the San Francisco
3 Bay-Delta estuary for our children and future generations by working to protect and restore Delta
4 water quality and quantity.

5 2. With my fellow panelists Gary Mulcahy, Roger Mammon, Conner Everts, and Tim
6 Strohane, Restore the Delta's case-in-chief for Part 2 of this proceeding will offer evidence in
7 support of the following arguments:

8 3. First, flow and water quality changes due to operation of the Petition Facilities would
9 increase selenium contamination and its interaction with selenium-accumulating nonnative invasive
10 clams, resulting in an unreasonable method of diversion of water.

11 4. Second, flow and water quality changes due to operation of Petition Facilities would
12 decrease availability of suitable and accessible habitat for the threatened giant garter snake, resulting
13 in an unreasonable method of diversion of water. While we continue to recommend denial of the
14 Change Petition, we nonetheless suggest permit conditions to address our concerns regarding the
15 giant garter snake should the petition be granted.

16 5. Third, if the State Water Resources Control Board (SWRCB) intends to approve the
17 Change Petition, we recommend the Board weigh its duties according to the breadth of authorities
18 available to it in California's water policy framework, analyze how much water is available in the
19 Sacramento River basin, and do a comprehensive benefit-cost analysis of all beneficial uses from
20 nature's services, given that the Board's 2010 flow criteria already establish a public trust basis of
21 protection. Apart from such analyses, we also point out in our testimony that the Change Petition is
22 contrary to the plain language of Water Code section 85086(c)(2) and should be denied.

23 6. Fourth, we provide evidence in support of findings that the Change Petition is
24 contrary to the state Legislature's command that it is the policy of the state of California to reduce
25 reliance on the Delta for California's future water needs.

26 7. Fifth, we recommend several reasons, based on both evidence presented in Part 1B
27 and here in Part 2, why Petition Facilities would be unreasonable methods of diversion in the Delta
28 as findings for denial of the Change Petition. In particular, proposed methods of placing and

1 operating fish screens on north Delta intake facilities would impinge, injure, and kill small fish
2 (including those of listed species) inhabiting or traversing the Sacramento River and would represent
3 an unreasonable method of diversion.

4 8. Sixth, we provide evidence that construction and operation of Petition Facilities will
5 further impair recreational and tribal cultural and subsistence beneficial uses of water both in and
6 upstream of the Delta in addition to the impairments and harms already caused by the State Water
7 Project (SWP) and Central Valley Project (CVP), and that Petition Facilities should be treated as in
8 effect a new water right.

9 9. Finally, we provide evidence that Petition Facilities are not in the public interest.
10 Petitioners and prospective project beneficiaries are failing to adhere to the “beneficiaries pay”
11 principle in state law. They lack a financial plan that allocates project costs. They lack participation
12 by CVP water contractors even as Petitioners and beneficiaries assume their participation in Petition
13 Facilities’ financing. No comprehensive financial or economic benefit-cost analysis has been done
14 on the project. Petition Facilities’ costs to beneficiaries’ ratepayers would be non-transparent and
15 would vary widely among southern California communities receiving imported water supplies
16 through Metropolitan Water District of Southern California (MWD).

17 **Interaction of Stressors**

18 10. The potential interaction of two stressors—selenium contamination from San Joaquin
19 River source water with nonnative invasive clams that bioaccumulate selenium prodigiously—are
20 recognized by scientists and in a San Francisco Bay Regional Water Quality Control Board TMDL
21 regulation adopted in 2015. Increased interactions between them that would result from approval of
22 the Change Petition and construction and operation of Petition Facilities would have serious effects
23 to estuary food webs. While we continue to recommend denial of the Change Petition, we
24 nonetheless suggest permit conditions to address these interactions.

25 11. We also document continuing high levels of selenium in western San Joaquin Valley
26 tile drain water that eventually drains to the San Joaquin River, thence to the Delta. This makes use
27 of exported Delta water to irrigate lands that are naturally contaminated with selenium and drainage-
28 impaired an unreasonable use of that water.

1 **Giant Garter Snake**

2 12. The giant garter snake was once common throughout the Central Valley’s extensive
3 marshes and wetlands. Conversion of over 95 percent of these wetlands to agricultural and urban
4 land uses has reduced the snake’s habitat dramatically, but it is persisting in small, dispersed
5 populations in remnant natural habitat as well as adapting to rice fields and other flood-irrigation
6 fields in the Delta and the valleys. However, its habitat is fragmented. Because it has adapted to rice
7 fields in particular, it is vulnerable to habitat loss should water market transfers increase as part of
8 Petition Facilities’ operations. Our case-in-chief will document abundant expectations voiced by
9 Petitioners’ environmental documents and by state and federal water contractors that water transfers
10 would increase with operations of Petition Facilities. Should such an increase occur in water
11 transfers, certain areas dedicated to water-intensive field crops may be idled with a resulting loss of
12 habitat for giant garter snake. If the Board wishes to approve the Change Petition, we recommend
13 several conditions relating to protection and recovery of giant garter snakes that are found in the
14 2017 U.S. Fish and Wildlife Recovery Plan for the species.

15 13. Such increased water transfer activity would be an unreasonable method of diversion
16 of water due to the ensuing loss of giant garter snake habitat provided by current irrigation and
17 cultivation of rice fields, especially in the Sacramento Valley. While we continue to recommend
18 denial of the Change Petition, we nonetheless suggest permit conditions to address our concerns
19 regarding the giant garter snake.

20 **Appropriate Delta Flow Criteria**

21 14. When it comes to major water infrastructure like Petition Facilities, the state of
22 California and the U.S. government prefer to avoid water policy questions altogether or treat them as
23 narrowly as possible. Our case-in-chief testimony reminds and encourages the Board to mindfully
24 apply broad water policies and requirements established in California law:

- 25 • that water use be reasonable and beneficial;
- 26 • that water use not be wasteful and inefficient;
- 27 • that the method of diversion of water must be reasonable;
- 28 • that the state is obligated to protect public trust resources whenever feasible;

1 • that water quality should not be degraded nor beneficial uses impaired by changes in
2 water quality;

3 • that it is the policy of the state to reduce reliance on the Delta to meet California’s
4 future water needs through water use efficiency and local and regional self-sufficiency.

5 15. Toward this end, the Board has a good sense of what flows would protect public trust
6 resources—in 2010 it answered the question of what flows are needed in and through the Delta to
7 promote population recovery of imperiled fish and other native species that inhabit or migrate
8 through the Delta. The Board’s task in deciding appropriate Delta flow criteria is to balance carefully
9 that level of protection with other beneficial uses in the Delta. To do that, we urge the Board to
10 conduct a comprehensive water availability analysis and a comprehensive benefit-cost analysis that
11 take account of all of nature’s services in the Delta estuary.

12 16. As a final point regarding appropriate Delta flow criteria, our case-in-chief
13 demonstrates that the specific section in the Water Code calling for these flow criteria has plain
14 language contrary to the dual conveyance change petition now before the Board. In short, state law
15 assumes only a change in the point of diversion from south to north, not a supposedly flexible, dual
16 conveyance project. At a minimum, we urge you to explain your interpretation of the Water Code on
17 this point if you decide to approve the Change Petition.

18 **Failure to Reduce Reliance on the Delta for Future Water Needs**

19 17. California Water Code section 85021 states that the policy of the state of California
20 is to reduce reliance on the Delta for California’s future water needs. Our case-in-chief will
21 document expectations voiced by Petitioners’ environmental documents and by state and federal
22 water contractors that water transfers will increase. Should such an increase in transfer activity
23 occur, it would at least maintain, and might well increase, reliance of water users beyond the Delta
24 region on Delta exports, contrary to the State Legislature’s command.

25 **Petition Facilities Are an Unreasonable Method of Diversion**

26 18. Our case-in-chief offers several reasons for denial of the Change Petition that
27 include:

28 1) Approval of the Change Petition is unreasonable because of Petitioners’ lack of
compliance with the scheme for acquiring and diligently exercising appropriate water rights permits.

1 2) Approval of the Change Petition is unreasonable because it is unreasonable for Petitioners
2 to use a change petition for Petition Facilities that will have region-wide effects, including changes
3 to the predominant source of water diverted, in violation of the principle that “a right cannot be so
4 changed that it in essence constitutes a new right.”

5 3) Approval of the Change Petition is unreasonable as a method of diversion because, despite
6 Petition Facilities’ regional-scale effects, the Change Petition process does not call for analysis of
7 whether and how much water is available for Petition Facilities to divert.

8 4) Approval of the Change Petition is unreasonable as a method of diversion because the
9 processing of the Change Petition is contrary to law and good planning practice, which dictate that
10 determining beneficial uses to be protected and the water quality objectives and “appropriate Delta
11 flow criteria” to accomplish that protection must precede a properly informed decision whether to
12 approve any project that would allow increased diversions from an already oversubscribed Delta.
13 Instead, the proceeding at hand proposes to set Delta flow criteria applicable to Petition Facilities
14 before conducting a watershed-wide planning process for determining tributary inflow requirements,
15 cold water requirements, and Delta outflows to which Petition Facilities should have to conform.
16 Plumbing should not come before planning.

17 5) Approval of the Change Petition is unreasonable as a method of diversion because the
18 manner by which Petition Facilities would divert water would cause unavoidable adverse impacts to
19 Delta fish species (many of which are protected as rare, endangered, or threatened). This is because
20 the fish screens proposed to mitigate such impacts have high uncertainty of success, and because
21 new water management structures among Petition Facilities would create more “predation hotspots.”

22 6) Approval of the Change Petition is unreasonable as a method of diversion because the
23 claimed purpose and needs for the project fail to reduce reliance on the Delta for California’s future
24 water needs, as commanded by the Legislature.

25 7) Approval of the Change Petition is unreasonable as a method of diversion because it
26 would increase the use of the imported supplies it creates for application to irrigate lands in the
27 service area of the San Luis Unit of the CVP that are either drainage-impaired, naturally
28 contaminated with selenium, boron, arsenic, and other toxic stressors, or both. Drainage from these

1 lands returns with San Joaquin River runoff to the Delta and, in the presence of Petition Facilities’
2 operations, would increase risks of benthic food web contamination and toxic tissue loading in listed
3 fish species like green sturgeon.

4 **Petition Facilities Are Contrary to the Public Interest**

5 19. Petition Facilities are not in the public interest. Petitioners and project beneficiaries
6 are failing to adhere to the “beneficiaries pay” principle in state law. Petitioners have failed to obtain
7 legislative authorization or funding for Petition Facilities. They lack a financial plan that allocates
8 project costs. They lack participation by CVP water contractors even as Petitioners and beneficiaries
9 assume their participation in Petition Facilities’ financing. No comprehensive financial or economic
10 benefit-cost analysis has been done on the project. Purchases of Delta islands along the subsurface
11 alignment of Petition Facilities by beneficiary MWD are intended to ease construction by
12 eliminating potential hurdles to on-site access for various land, biological, and geotechnical surveys,
13 and for construction staging. Petition Facilities’ costs to beneficiaries’ ratepayers would be non-
14 transparent and would vary widely among southern California communities receiving imported
15 water supplies through MWD. We provide a case study of Central Basin Municipal Water District to
16 support this contention.

17 Thank you for the opportunity to complete presentation of our case-in-chief.